NG KOK POOI

v.

BRUNSWOOD ID SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[ORIGINATING PETITION NO. D5-26-31-2005]
19 APRIL 2006

COMPANY LAW: *Members' rights - Oppression - Whether petitioner had locus standi to file petition against respondents - Whether petitioner a registered shareholder - Whether petitioner estopped from exercising statutory rights available to registered shareholders or members of a company - Whether petition ought to be struck out - Companies Act 1965, s. 181*

The petitioner, claiming to be a beneficial shareholder of the 1st respondent, filed a petition against all the respondents under s. 181 Companies Act 1965 ('CA'), submitting that the affairs of the 1st respondent were conducted and the powers of the directors were exercised in a manner which was oppressive and/or in disregard of his interest, and/or which unfairly discriminated against one or more members of the 1st respondent. The respondents filed an application to strike out the petition pursuant to O. 18 r. 19(1)(b), (c) or (d) Rules of the High Court 1980, and/or under the inherent jurisdiction of the court, or s. 221(2)(f) CA, on the basis that: (i) the petitioner had no *locus standi* to present this petition as he was not a registered member of the 1st respondent; and (ii) the petitioner was estopped by his conduct in the previous proceedings filed by him in the Kuala Lumpur Sessions Court ('KL Sessions Court suit') from filing and proceeding with the petition on the basis that he was the shareholder or member of the 1st respondent with the rights of a shareholder/member. It was not in dispute that the petitioner, whether prior to or at the time of filing of the petition and even now, was never registered as a shareholder or member of the 1st respondent, and that the petitioner had by his KL Sessions Court suit and on oath confirmed that he did not want to accept a transfer of the shares in the 1st respondent to him.

Held (allowing the respondent's application and striking out the petition):

(1) In the present case, the conduct of the petitioner in the KL Sessions Court suit clearly indicated that the petitioner had waived his right to be a member or shareholder of the 1st respondent, and was now estopped from stating or claiming that the respondents were "using statute as an engine of fraud" to assert that the petitioner had no *locus standi* to file this petition, allowing him to fall within the exception to the general rule as laid down in *Owen Sim Lian Khur v. Piasau Jaya Sdn Bhd.* The petitioner knew all along that he was not a registered member or shareholder of the 1st respondent, positively refused to accept a transfer of the shares to him (as what he did in the KL Sessions Court suit) and failed to take any steps to rectify the register when he could have and should have done so earlier. As such, the petitioner herein should be estopped from exercising the statutory rights provided for the benefit of registered shareholders or members of a company as he had, by his own conduct in the suit, deprived and disentitled himself of such rights. The petitioner had failed to establish that he was qualified to make out a claim under s. 181 CA. On this ground alone, without having to go into the merits of the petitioner's complaints, the petition could be dismissed with costs. (paras 31, 32 & 34)

(2) This was a clear case where the doctrine of *res judicata* and issue estoppel (in its wider sense as laid down by the Supreme Court in *Asia Commercial Finance (M) Sdn Bhd v. Kawal Teliti Sdn Bhd*) arose. The petitioner could not now argue or be allowed to pursue a claim under s. 181 CA to claim oppression against him as a "beneficial shareholder" of the 1st respondent. The issue of him being entitled as a shareholder at the material time was not challenged as it was his own conduct in the KL Sessions Court suit, not that of the respondents, that disentitled him of such rights. The right to file the petition was regulated by statute and was premised on the fact that the petitioner had the onus to prove that he was a "member" of the 1st respondent as defined in the CA *ie*, a registered shareholder, and he had failed to do so. (para 41)

(3) In this instance, the court need not and should not go into the minute examination of the alleged instances of oppression and/or fraud raised in the petition at this stage. If a petitioner

has no *locus standi* to file the petition or in cases where the doctrine of *res judicata* or issue estoppel arises, it matters not whether the allegations of oppression and/or fraud are substantiated or otherwise. (para 43)

(4) Based on the above considerations, the petitioner had no *locus standi* and was estopped from filing the present petition. (para 44)

Case(s) referred to:

Asia Comercial Finance (M) Sdn Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Central Secutiries (Holdings) Bhd v. Haron Mohamad Zaid [1979] MLJ 244 ***(refd)***

In Re Len Chee Omnibus Co Ltd [1969] MLJ 202 ***(refd)***

Niord Pty Ltd v. Adelide Petroleum NL [1990] 8 ACLC 684 ***(refd)***

Owen Sim Lian Khur v. Piasau Jaya Sdn Bhd [1996] 4 CLJ 716 FC ***(refd)***

Public Trustee v. Kenward [1967] 1 WLR 1062 ***(refd)***

Re M Dalley & Co Pty Ltd [1968] 1 ACLR 489 ***(refd)***

SCF Finance Co Ltd v. Masri & Anor (No 3) [1987] 1 All ER 194 ***(refd)***

Verghese Mathai v. Telok Plaintations Sdn Bhd [1988] 2 MLJ 181 ***(refd)***

Yat Tung Investment Co v. Dae Hong Bank & Anor [1975] 2 WLR 690 ***(refd)***

Legislations referred to:

Companies Act 1965, ss. 16(6), 162, 181, 221(2)(f)

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)

For the petitioner - Colin Andrew Pereira; M/s Goh Wong & Pereira
For the respondents - Renu Zechariah; M/s Rosley Zechariah

Reported by Suresh Nathan

JUDGMENT

Ramly Ali J:

[1] The petitioner (who claimed to be a beneficial shareholder of respondent 1) files a petition (encl. 1) against all the respondents under s. 181 of the Companies Act 1965, in that the affairs of respondent 1 were conducted and the powers of the directors were exercised in a manner which is oppressive; and/or in disregard of his interest; and/or which unfairly discriminates against; and/or is otherwise prejudicial to one or more members of the 1st respondent.

[2] The petitioner further contends that the affairs of the 1st respondent should not be conducted in a manner likely to defeat the legitimate expectations of one or more its members. The petitioner contends that it was always intended that all parties would act in utmost goodfaith and that 1st respondent was formed on the basis of personal relationship involving mutual confidence. The petitioner further contends that the nature of the 1st respondent is one in which there is an understanding that all the shareholders would participate in management and share in the profits of the 1st respondent.

[3] The petitioner also contends that 1st respondent acting through the 2nd, 3rd and 4th respondents has breached its obligations imposed by law, equity and under the shareholders agreement.

[4] The respondents filed an application (*vide* notice of motion in encl. 8) to strike out the petition pursuant to O. 18 r. 19(1)(b), (c) or (d) of the Rules of the High Court 1980; and/or under the inherent jurisdiction of the court; or s. 221(2)(f) of the Companies Act 1965, on the basis that:

(a) the petitioner has no *locus standi* to present this petition as he is not a registered member of the 1st respondent;

(b) the petitioner is estopped by his conduct in the previous proceedings filed by him (in the Kuala Lumpur Sessions Court) from filing and proceeding with the petition on the basis that he is a shareholder or member of the 1st respondent with the rights of a shareholder/member.

Factual Background

[5] On or about August 1996 the petitioner (who was a partner of a business known as Kontad Interior Decorations) with one Mr. Kew Thin Song ("Kew") and Brunswood Industry Sdn. Bhd. ("BISB") decided to form a joint venture company for the purpose of undertaking and providing marketing and services involved in the business of interior decoration.

[6] A shareholders agreement was drawn up and dated 12 August 1996 between the petitioner and BISB and pursuant to the said agreement the 1st respondent was incorporated. It was at all times believed by BISB that the petitioner was entering into the agreement on behalf of himself and Kew as partners of Kontad Interior Decorations.

[7] It was a term of the agreement and was at all times the intention of the parties that the contribution of capital towards the 1st respondent's issued and paid up capital by the petitioner, Kew and BISB would be as follows:

(a) The petitioner would contribute fixed assets, a factory, plant and machinery, office equipment, motor vehicles, stocks etc. to the 1st respondent ("the assets") valued at RM500,000 and would receive the sum of RM300,000 and 40% equity in the 1st respondent. The value of the 40% equity was pegged at RM200,000. The petitioner would therefore have capitalised his interest in the 1st respondent by transferring the assets worth RM500,000 to the 1st respondent and receiving 40% of the paid up capital of the 1st respondent together with cash of RM300,000 from BISB.

(b) Kew had a separate arrangement with the petitioner that he would receive half of the 40% equity that the petitioner would be allocated in the 1st respondent ie, 20% share in the 1st respondent. It has since transpired that Kew has waived his right to the 20% *vis a vis* the petitioner.

(c) BISB will capitalise its interest in the 1st respondent by paying the petitioner the RM300,000 for the assets that the petitioner would invest into the 1st respondent, (such payment being made by BISB on the 1st respondent's behalf) and BISB would be allocated 60% equity in the 1st respondent. In effect BISB would have capitalised their interest in the 1st respondent with a cash injection of RM300,000, (such cash in effect being paid over to the petitioner).

[8] With that intention and agreement, the 1st respondent was incorporated. The petitioner's 40% equity was issued and held by BISB for the petitioner's benefit and was awaiting to be transferred to the petitioner.

[9] BISB complied with their obligations and paid the RM300,000 capital contribution to the 1st respondent (which was paid to the petitioner for the agreed portion of the assets to be paid in cash) and in exchange BISB received 60% of the equity in the 1st respondent.

[10] However, the petitioner then embarked on a course of conduct which was detrimental to the 1st respondent and relations soured between the shareholders of the 1st respondent ie, the petitioner as the beneficial shareholder and BISB.

[11] Once the relationship soured, the business of the 1st respondent suffered and of course the value of the 1st respondent shares dropped. The petitioner unilaterally opted and decided at that stage not to take up the 40% equity in the 1st respondent and instead demanded money value for the 40% equity in the 1st respondent. This was not an option available or provided for in the agreement between the parties. A series of exchange of letters between the solicitors of the petitioner and BISB show the petitioner's views on the terms of the agreement. The petitioner's views as per the correspondence was that as he was entitled to 40% equity in the 1st respondent and as he did not want to take up the 40% equity, he requested BISB to buy him out for RM200,000.

Petitioner's Suit In The Kl Sessions Court

[12] The petitioner then claimed for BISB to compensate him for the value of the assets he invested in monetary value of RM500,000, instead of the cash of RM300,000 and the 40% equity in the 1st respondent as agreed in the agreement. The petitioner filed a suit in the Kuala Lumpur Sessions Courts *vide* Summons No. S12-52-16953-1999 ('the KL Sessions Court Suit').

[13] In the KL Sessions Court Suit, the petitioner was the plaintiff and BISB was the defendant. The petitioner pleaded, that he was entitled to both the balance monies for the assets ie, the sum of RM200,000 and to the 40% equity in the 1st respondent. It was BISB's stand and defence that the petitioner was not entitled to both the full value of the assets and to the 40% but only RM300,000 (which was paid and accepted in full accord and satisfaction) and 40% equity in the 1st respondent (pegged at RM200,000) as agreed in the agreement.

[14] Despite the petitioner's pleaded facts in the statement of claim that he was entitled to both the RM200,000 and the 40% equity in the 1st respondent, the petitioner opted not to and did not seek the specific relief and remedy for the delivery of the 40% equity to him by BISB. This was despite a firm offer on the table by BISB for the petitioner to do so.

[15] The petitioner had instead chosen to make a claim for the sum of RM200,000 and damages and opted for the 40% equity in the 1st respondent to be translated into money value by his KL Sessions Court Suit.

[16] It is not in dispute that the petitioner, whether prior to or at the time of filing of the petition and/or until now or at any material time, was never registered as a shareholder or member of the 1st respondent and that the petitioner has by his KL Sessions Court Suit and has on oath confirmed that he does not want to accept a transfer of the shares in the 1st respondent to him.

[17] At all material times during the trial and proceedings in the KL Sessions Court Suit, BISB raised that the petitioner was only entitled to the 40% equity in the 1st respondent as their main defence to the petitioner's claim and led evidence to this effect.

[18] On 8 October 2004 after hearing all the evidence and upon the written submissions being filed, the decision made in the KL Sessions Court Suit was that BISB was to pay the sum of RM200,000 to the petitioner being the balance purchase price for the assets and did not allow the petitioner's claim for damages. BISB filed an appeal to the High Court on 21 October 2004 and which appeal is now fixed for hearing on 12 April 2006.

Issues To Be Decided

[19] The issues to be decided by this court are as follows:

(a) Whether the petitioner has no *locus standi* to present this petition as he is not a registered shareholder or member of the 1st respondent;

(b) Whether the petitioner is estopped by his conduct in the previous proceedings filed by him (in the Kuala Lumpur Sessions Court) from filing and proceeding with the petition on the basis that he is a shareholder or member of the 1st respondent with the rights of a shareholder or member.

Findings Of Court

[20] The facts of the proceedings that have transpired in the KL Sessions Court are relevant to show the stand the petitioner took in the matter, the evidence given on oath by him and how the petitioner is bound by his own stand and is therefore estopped from filing the present petition.

[21] In the KL Sessions Court suit, the petitioner has taken the following stand, namely:

(a) the petitioner had equated the sum of RM200,000 as being the value of 40% equity in the 1st respondent;

(b) the petitioner did not want to take or accept a transfer of the 40% equity in the 1st respondent as he wished to sell the same to the other respondents for the value of RM200,000; and

(c) the petitioner did not seek the specific remedy for the delivery of the 40% equity to him while he pleaded it and this confirms that he did not want to take or accept a transfer of the said shares.

[22] At all material times in the proceedings before the KL Sessions Court, BISB raised that the petitioner was only entitled to the 40% equity in the 1st respondent as their main defence and led evidence to this effect. The petitioner led evidence to rebut the respondent's defence.

[23] Despite the stand taken above, the petitioner now claims himself to still be the 'beneficial owner' of the 40% equity in the 1st respondent, having taken no steps whatsoever to become the registered shareholder and in fact refusing to take/accept a transfer of the said shares, whether intentionally, negligently and/or inadvertently, when he could have and should have done so.

The Relevant Law

Who Can Be A Petitioner Under s. 181 Of The Companies Act 1965

[24] The opening of s. 181 provides as follows:

> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground ...

[25] Section 16(6) of the Companies Act 1965 which defines, "Members of Company" reads as follows:

> The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.

[26] In *Owen Sim Lian Khur v. Piasau Jaya Sdn. Bhd.* [1996] 4 CLJ 716 the Federal Court ruled the following:

> The category of persons within a company who may present a petition under section 181 of the Act would be, as a general rule, only one who comes within the terms of section 16(6). This would mean that a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition.
>
> Put another way, in general, a Petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the Court by the section.
>
> There may be cases where an application of the general rule would be unfair. If it is unjust or inequitable to permit a Respondent to a petition under section 181 to assert that a petitioner has no *locus standi* to move the Court, then he will be estopped from so asserting. A Respondent who is guilty of unconscionable or inequitable conduct will not be permitted to rely upon the requirement of membership in order to defeat a petitioner's standing as this would amount to his using statute as an engine of fraud.

[27] In the present case, it has not been disputed and in fact has been averred and admitted by the petitioner himself in his affidavits that he is not a registered shareholder or member of the 1st respondent and the petitioner is unable to demonstrate that his name appears on the 1st respondent's company register at the date of presentation of the petition.

[28] In *Niord Pty. Ltd. v. Adelide Petroleum NL* [1990] 8 ACLC 684, the Court in Australia held that an applicant must be registered as a member before he could complain of oppressive conduct and that a mere equitable interest as an unregistered transferee was not sufficient.

[29] In *Re M. Dalley & Co. Pty. Ltd.* [1968] 1 ACLR 489, the question of standing was raised and the court ruled that the onus of proving that the petitioner was qualified under the then Australian equivalent of s. 181 was on the petitioner. Lush J, in that case, further held that "membership for that purpose could not be established unless it was shown that at the date of the petition, the petitioner was registered in the register as the holder of shares."

[30] The s. 181 remedy is a creature of statute and basically, unless the applicant comes squarely within the section, the court ought not to entertain the action. This position has been succinctly stated by Siti Norma Yaacob J, in *Verghese Mathai v. Telok Plaintations Sdn. Bhd.* [1988] 2 MLJ 181 as follows:

> As the Petitioner's *locus standi* is regulated by statute, he must comply strictly with the mandatory provisions of section 181 ...

[31] In the present case, the conduct of the petitioner in the KL Sessions Court suit clearly indicates that the petitioner has waived his right to be a member or shareholder of the 1st respondent and is now estopped from stating or claiming that the respondents are "using statute as an engine of fraud" to assert that the petitioner has no *locus standi* to file this petition, allowing him to fall within the exception to the general rule as laid down in *Owen Sim*'s case. To do so would be to sanction an abuse of process of the courts by the petitioner and to allow the petitioner "two bites to the cherry".

[32] The petitioner knew all along that he was not a registered member or shareholder of the 1st respondent, positively refused to take transfer of the shares to him (as what he did in the KL Sessions Court suit) and failed to take any steps to rectify the register when he could have and should have done so earlier. As such, likened to the position off the respondent in *Owen Sim*'s case, the petitioner herein should be estopped from exercising the statutory rights provided for the benefit of registered shareholders or members of a company as he has by his own conduct (in the KL Sessions Court Suit) deprived and disentitled himself of such rights.

[33] The law provides the means for which an aggrieved party can have the register of a company rectified if there is any issue of the company's register having omitted the party's name as a shareholder – ie, under s. 162 of the Companies Act 1965. Alternatively, if the dispute is such that it is unsuitable to be decided upon by the summary procedure provided for under s. 162, the proper course is to file a suit against the company to resolve the issue.

(see: (i) In *Re Len Chee Omnibus Co. Ltd.* [1969] MLJ 202; and

(ii) *Central Secutiries (Holdings) Bhd. v. Haron bin Mohamad Zaid* [1979] MLJ 244).

[34] The petitioner has failed to establish that he is qualified to make out a claim under s. 181 of the Companies Act 1965. On this ground alone, without having to go into the merit of the petitioner's complaints in the petition, this petition can be dismissed with costs.

Res Judicata/Estoppel

[35] It is indisputable that the issue of the petitioner's rights and entitlement to the shares in the 1st respondent was raised at length in the earlier KL Sessions Court suit but the petitioner elected not to proceed with a determination on the issue. In fact the petitioner had equated the sum of RM200,000 as being the value of 40% equity in the 1st respondent and did not want to take or accept a transfer of the 40% equity as he wished to sell the same to the other respondents for that value and also elected only to pursue a liquidated claim *in lieu* of the shares.

[36] By his earlier conduct and stand in the KL Sessions Court suit, the petitioner has deprived and disentitled himself of the rights as shareholder or member of the 1st respondent. The petitioner cannot be allowed now to pursue a claim under s. 181 of the Companies Act 1965, to claim oppression against him as a "beneficial shareholder" of the 1st respondent when he could have and should have sought as such in the earlier proceedings or simply could have accepted a transfer of the shares (which were offered to him). This is a clear case where doctrine of *res judicata* and issue estoppel arises.

[37] The limited concept of estoppel applies where there must be (i) similarity in the cause of action; (ii) similarity in remedies claimed; and (iii) similarity in the parties. However, the wider concept of estoppel is not confined to causes of action or issues which the court actually asked to decide or has already decided. It covers also causes of action or issues of facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[38] This principle was clearly laid down by the Supreme Court in *Asia Comercial Finance (M) Sdn. Bhd. v. Kamal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 where it was held:

A In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the
B original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence ...

There is one school of thought that issue estoppel applies only to issues actually decided by the Court in the previous proceedings and not to issues which might have been and which were not
C brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues, which might have been decided by the Court are still covered by the doctrine per *res judicata* ie, doctrine of estoppel per *res judicatum*.

D We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel.

[39] Other cases which illustrate the same points and were also
E referred to and followed by the Supreme Court *Asia Commercial Finance* are as followed:

(i) *Public Trustee v. Kenward* [1967] 1 WLR 1062;

(ii) *Yat Tung Investment Co. v. Dae Hong Bank & Anor* [1975] 2
F WLR 690; and

(iii) *SCF Finance Co. Ltd. v. Masri & Anor (No. 3)* [1987] 1 All ER 194.

[40] In *SCF Finance Co. Ltd. (supra)*, the English Court of Appeal
G held that even a reservation of an issue by a party in a previous proceeding was ineffective to prevent the estoppel from arising against the said party, where the said party had pleaded that issue but not to proceed on the issue in the previous proceeding. It was held that the defendant in that case was not entitled to assert
H that issue afresh in subsequent proceedings even if that issue was not heard and determined and it was even 'reserved'.

[41] This is a clear case where the doctrine of *res judicata* and issue estoppel (in its wider sense as laid down by the Supreme
I Court in *Asia Commercial Finance*) arises. The petitioner cannot now argue or be allowed to pursue a claim under s. 181 to claim oppression against him as a "beneficial shareholder" of the 1st respondent. The issue of him being entitled as a shareholder at

the material time was not challenged as it was his own conduct in the KL Sessions Court suit and not the conduct of the respondents that disentitled him of such rights. The right to file the petition is regulated by statute and is premised on the fact that the petitioner has the onus to prove that he is a "member" of the 1st respondent company as defined in the Companies Act 1965 ie, a registered shareholder and he has failed to do so.

[42] On this issue alone, the petition fails and can be dismissed.

[43] The petitioner contends that this petition cannot be determined summarily without the benefit of a thorough consideration of the evidence simply because of the nature of the allegations of oppression and/or fraud raised in the petition. The court is of the view that in the present case, the court need not and should not go into the minute examination of the alleged instances of oppression and/or fraud at this stage. If the petitioner has no *locus standi* to file the petition or in cases where the doctrine of *res judicata* or issue estoppel arises, it matters not whether the allegation of oppression and/or fraud are substianted or otherwise.

Decision

[44] Based on the above considerations, it is the court's judgment that the petitioner has no *locus standi* and is estopped from filing the present petition. Therefore, the petition is struck out with costs and the respondent's notice of motion (encl. 8) is allowed with costs.